



9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2020-0511]

RIN 1625-AA00

Safety Zone; Spa Creek, Annapolis, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain waters of Spa Creek. This action is necessary to provide for the safety of life on these navigable waters within Market Slip (Ego Alley), Annapolis, MD, during a film project on October 22, 2020 (alternate date October 23, 2020). This regulation prohibits persons and vessels from being in the safety zone unless authorized by the Captain of the Port Maryland-National Capital Region or a designated representative.

DATES: This rule is effective from 5 a.m. on October 22, 2020 through noon on October 23, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2020-0511 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ron Houck, U.S. Coast Guard Sector Maryland-National Capital Region; telephone 410-576-2674, email Ronald.L.Houck@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR	Code of Federal Regulations
COTP	Captain of the Port
DHS	Department of Homeland Security
FR	Federal Register
NPRM	Notice of proposed rulemaking
§	Section
U.S.C.	United States Code

II. Background Information and Regulatory History

Hoonigan Industries, of Long beach, CA, notified the Coast Guard that it will be conducting a film project using barges and other marine equipment positioned at two locations in Spa Creek, at Annapolis, MD. In response, on September 11, 2020, the Coast Guard published a notice of proposed rulemaking (NPRM) titled "Safety Zones; Spa Creek, Annapolis, MD" (85 FR 56186). In that NPRM we proposed to establish 2 security zones— the first within a portion of Market Slip (Ego Alley) and the second across the width of Annapolis Harbor. The first safety zone was to be enforced from 5 a.m. to noon on October 19, 2020, or if necessary due to inclement weather on October 19, 2020, from 5 a.m. to noon on October 20, 2020. The second safety zone was to be enforced from 7 a.m. on October 20, 2020, through noon on October 22, 2020, or if necessary due to inclement weather continued through noon on October 23, 2020.

After NPRM had been sent to the Office of the Federal Register and scheduled for publication, the Coast Guard was notified by the film company that they were making

three changes to the project. First, the filming date at Spa Creek within Market Slip (Ego Alley) was rescheduled from October 19, 2020, to October 22, 2020 (additional rain date of October 23, 2020, if needed.) Second, the company also informed the Coast Guard that another vessel would be used during filming at this location. No changes to the filming hours at this location were made. Filming is scheduled to take place from 5 a.m. to noon on October 22nd (with additional filming on October 23rd if necessary due to inclement weather on the preceding dates). Finally, the film company notified the Coast Guard that the filming scheduled for the location across the width of Spa Creek between Annapolis City Dock and Eastport had been cancelled.

Due to the date of the scheduled event, the Coast Guard did not have time to publish a supplemental notice of proposed rulemaking (SNPRM). To the extent, if any, that the Coast Guard's inability to publish a supplemental notice of proposed rulemaking invalidates the notice requirement required by the Administrative Procedure Act, the Coast Guard issues this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable and contrary to the public interest to do so. Immediate action is needed to protect persons and vessels from the hazards associated with this event. It is impracticable and contrary to the public interest to publish an NPRM or SNPRM because

a final rule needs to be in place by October 22, 2020, to minimize potential danger to the film crew and nearby public.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because immediate action is needed to restrict vessel traffic to protect life, property and the environment and respond to the potential safety hazards associated with the film project.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Maryland-National Capital Region (COTP) has determined that potential hazards associated with the film project will be a safety concern for anyone within Market Slip (Ego Alley), Annapolis, MD, during filming. The purpose of this rule is to ensure safety of vessels and the navigable waters in the safety zone before, during, and after the scheduled event.

IV. Discussion of Comments

We received 7 comments on our NPRM published September 11, 2020. The comments are available for public inspection at www.regulations.gov under docket USCG-2020-0511. We address the commenter's concerns below.

1. Is it necessary for the Coast Guard to issue this rule?

A few commenters questioned whether it was necessary for the Coast Guard to issue a rule (create a safety zone) for this event. The Coast Guard has determined that access to the water, shoreline to shoreline, in the area near where filming will take place

needs to be restricted to ensure the safety of those involved in the filming and the nearby public. Safety zones are only necessary under certain conditions. Not every event on the water requires access to be restricted. A safety zone for this event is needed because the project is likely to pose an extra or unusual hazard to the safety of human life on and near the navigable waters of the United States at Market Slip (Ego Alley), Annapolis MD. Hazardous activities associated with the project include aerial stunt car jumps with minimum heights across the entire width of the waterway. Filming and associated activities may be conducted on the water or shore area.¹ The Coast Guard is issuing this rule under the authority of 46 U.S.C. 70034.

2. Why didn't the Coast Guard provide specifics about the filming project, such as what the company is filming?

Some commenters expressed concern about a lack of specificity of the planned activities associated with the film project. Certain details of the planned event were still being developed at the time of publishing the proposed rule. The Coast Guard wanted to ensure the public was afforded an opportunity to comment on its proposal, even if final details had not yet been provided by the film company. The Coast Guard is focused on the importance of identifying and mitigating the potential hazards posed by the event, not on items such as what the film project is actually filming or who may be involved.

3. Will all of Spa Creek be blocked?

One commenter requested clarification about whether the entire width of Spa Creek could be covered by the safety zone and whether it would include navigable waters immediately adjacent to the Annapolis City Dock. Yes, it would have. However, with

¹ See 33 CFR 165.20 (definition of “safety zone”).

the changes made by the film company, the safety zone no longer covers all of Spa Creek, but covers only all navigable waters of Spa Creek within Market Slip (Ego Alley), from shoreline to shoreline, within coordinates specified in the regulation. It includes navigable waters immediately adjacent to the Annapolis City Dock. Coast Guard vessels will be present to enforce this safety zone. No persons or vessels will be authorized to transit the area of the safety zone during actual filming, however, they may be allowed to do so immediately before and after, and at the discretion of the COTP or the COTP's representative, following consultation with on scene film project representatives. Waterway users can seek permission to enter the safety zone by contacting the COTP or the COTP's representative by telephone at 410-576-2693 or on Marine Band Radio VHF-FM channel 16. The Coast Guard vessels enforcing this safety zone can be contacted on Marine Band Radio VHF-FM channel 16.

5. Why was there a 15-day comment period rather than the normal 30 days?

One commenter asked why the Coast Guard only provided a 15-day comment period rather than the agency's normal 30 days. The Coast Guard considers public participation essential to effective rulemaking. However, the Administrative Procedure Act does not specify a minimum time for submission of written comments. And, while the Coast Guard normally tries to allow 30 days of comment, cases and circumstances may arise that make it prudent to have a shorter comment period.² It was not possible to publish the NPRM for this action sooner as the necessary details were not yet available to the Coast Guard. And, we were concerned that a 30-day comment period would not leave the agency enough time to review all comments, respond to any significant

² See 33 CFR 1.05-15.

comments, and have a final rule drafted and published in the Federal Register in time for the scheduled event. Considering all the factors—the time frame before the event, the length of the NPRM, the relatively short proposed regulatory text, and the location of the event—we felt that 15 days allowed sufficient time for members of the interested public to review the notice and provide us with informed feedback on the proposal. This analysis in determining the sufficiency of a 15-day comment period is consistent with the legislative history of the Administrative Procedure Act, which indicates that an NPRM “must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument.”³

6. Did the Coast Guard consider impacts to small business?

One commenter was concerned about whether or not their company would be allowed to conduct a planned sailing cruise for the affected area of Annaopolis Harbor and Spa Creek. The Coast Guard's rule allows vessels desiring to transit to or from local waterside businesses located within the safety zone during enforcement to seek permission to enter the zone. Such vessels can contact the Coast Guard vessels enforcing this safety zone on Marine Band Radio VHF–FM channel 16 (156.8 MHz).

V. Changes from the NPRM and This Final Rule

The Coast Guard amended the regulatory text from that proposed in the NPRM to account for the date change to the first safety zone and the removal of the second safety zone. Otherwise, this rule adopts the text of the NPRM without change.

This rule establishes a temporary safety zone from 5 a.m. on October 22, 2020, to noon on October 23, 2020. The safety zone will cover all navigable waters of Spa Creek,

³ JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 273 (5th ed.2012) (citing ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S.Doc. No. 248 79-258 (1946)).

within Market Slip (Ego Alley), from shoreline to shoreline, bounded on the southeast by a line commencing at latitude 38°58'34.2" N, longitude 076°29'05.6" W, thence southwest to latitude 38°58'32.9" N, longitude 076°29'06.4" W, located at Annapolis, MD. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled 5 a.m. to noon film project. Except for vessels operated by Hoonigan Industries and marine equipment, which includes any vessel, barge or other equipment operated by Smith Marine Towing, Inc., or its subcontractors, no vessel or person will be permitted to enter this safety zone without obtaining permission from the COTP or a designated representative. The COTP will notify the public that the safety zone will be enforced by all appropriate means to the affected segments of the public, including publication in the **Federal Register**, as practicable, in accordance with 33 CFR 165.7(a). Such means of notification may also include, but are not limited to, Broadcast Notice to Mariners or Local Notice to Mariners. Vessels or persons violating this rule are subject to the penalties set forth in 46 U.S.C. 70036 (previously codified in 33 U.S.C. 1232) and 46 U.S.C. 70052 (previously codified in 50 U.S.C. 192).

VI. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory

approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-day, day-of-week and time-of-year of the safety zone. Vessel traffic will be able to safely transit around this safety zone which will impact a small designated area of the Spa Creek within Market Slip (Ego Alley) for 14 total enforcement hours. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF-FM marine channel 16 about the zone, and the rule will allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the FOR FURTHER INFORMATION CONTACT section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023-01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting 14 total enforcement hours that will prohibit entry within a portion of Spa Creek within Market Slip (Ego Alley). It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this

determination is available in the docket. For instructions on locating the docket, see the ADDRESSES section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T05-0511 to read as follows:

§ 165.T05-0511 Safety Zone; Spa Creek, Annapolis, MD.

(a) *Location.* The following area is a safety zone: All navigable waters of Spa Creek, within Market Slip (Ego Alley), from shoreline to shoreline, bounded on the southeast by a line commencing at latitude 38°58'34.2" N, longitude 076°29'05.6" W, thence southwest to latitude 38°58'32.9" N, longitude 076°29'06.4" W, located at Annapolis, MD. These coordinates are based on datum NAD 83.

(b) *Definitions.* As used in this section---

Captain of the Port (COTP) means the Commander, U.S. Coast Guard Sector Maryland-National Capital Region.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Maryland-National Capital Region to assist in enforcing any safety zone described in paragraph (a) of this section.

Marine equipment means any vessel, barge or other equipment operated by Smith Marine Towing, Inc. or its subcontractors.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative. Except for vessels operated by Hoonigan Industries and marine equipment, all vessels underway within this safety zone at the time it is activated are to depart the zone.

(2) To seek permission to enter, contact the COTP or the COTP's representative by telephone at 410-576-2693 or on Marine Band Radio VHF-FM channel 16 (156.8 MHz). The Coast Guard vessels enforcing this section can be contacted on Marine Band Radio VHF-FM channel 16 (156.8 MHz).

(3) Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This section will be enforced from 5 a.m. to noon on October 22, 2020, or if necessary due to inclement weather on October 22, 2020, from 5 a.m. to noon on October 23, 2020.

Dated: October 7, 2020

Joseph B. Loring,
Captain, U.S. Coast Guard,
Captain of the Port Maryland-National Capital Region.
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